Celcom (Malaysia) Bhd v Inmiss Communication Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D3–24–197 OF 2002
ZULKEFLI J
10 MARCH 2003

Civil Procedure *— Injunction — Erinford injunction — Jurisdiction of court — Court dismissed earlier application to restrain defendant from filing winding up petition — Whether same court could hear application for Erinford injunction to restrain defendant from taking further steps in winding up petition — Jurisdiction of court to grant injunction to restrain a winding up petition which has been filed*

Civil Procedure *— Injunction — Erinford injunction — Erinford injunction pending hearing of appeal against dismissal of application for injunction to restrain defendant from filing a winding up petition — Principles applicable to Erinford injunction*

The plaintiff applied in encl 22 for an Erinford injunction to restrain the defendant from taking further steps in Winding up Petition No D3–28–1134–2002 pending hearing of the plaintiff's appeal to the Court of Appeal against the decision made by the High Court dismissing the plaintiff's application in encl 3 for an injunction to restrain the defendant from filing a winding up petition against the plaintiff.

Held, allowing the plaintiff's application:

(1) Although the court had earlier dismissed the plaintiff's application under encl 3, it still had jurisdiction to hear the application for an Erinford injunction and to grant the same. The consideration for the granting of the Erinford injunction was different from the consideration under the application in encl 3 and there was nothing inconsistent for the court to grant the prayers under encl 22 notwithstanding the decision dismissing encl 3 (see p 182C–D); *Erinford Properties Ltd v Cheshire County Council* [1974] 2 All ER 448 followed.

(2) The claim was nothing more than a monetary claim which was being disputed by the plaintiff. There was no evidence that the plaintiff was not financially able to pay if indeed it was subsequently found that the said amount was due (see p 183A–B).

(3) The plaintiff is a public listed company with the Kuala Lumpur Stock Exchange ('KLSE'). It was undergoing a merger exercise with TM Cellular Sdn Bhd and upon completion of the same, the plaintiff would have the largest number of subscribers for mobile phones in the country. The filing of the petition would have an adverse impact on its shares and the public perception of the company. The plaintiff as a public listed company was also subject to constant monitoring and supervision by the KLSE and the Securities Commission. The plaintiff was under a duty to

apprise the KLSE of the petition at every stage and the plaintiff would have to face likely media attention and speculation arising from the petition. Such consequences could not be quantified in monetary terms and could not be compensated. The public interest was a relevant and important factor for consideration (see p 183B–D).

(4) The filing of the petition constituted an event of default in the facilities agreement between the plaintiff and its financiers. In particular, the plaintiff had recently completed a restructuring exercise involving a sum of RM1.8b and in the process saved the company a substantial amount of money. However, with the filing of the petition, the plaintiff was now in default of the agreement and was now at the mercy of its financiers as to whether the facilities would be recalled. In the event this occurred, the entire organization of the plaintiff would be adversely affected. This was a real possibility and would affect all its shareholders and all the KLSE market as well. The plaintiff owed a responsibility both legally and morally to its subscribers and the public to ensure that its services were not affected (see p 183F–G).

(5) The petition would also have an impact on the proposed merger between the plaintiff and TM Cellular Sdn Bhd for obvious reasons as no entity would be prepared to merge with another if the latter was a subject matter of a winding up petition. The petition based on a disputed sum should not be allowed to proceed and thwart the merger plans (see p 183G–H).

(6) The status quo should be preserved pending the determination of the plaintiff's appeal. This was to ensure that the integrity of the appeal was preserved and the same was not rendered nugatory. In this regard, the status quo was the position of the plaintiff and the defendant immediately before the filing of the originating summons and encl 3 by the plaintiff. The status at the time was that there was no winding up petition filed against the plaintiff. The balance of convenience was in favour of granting the Erinford injunction. Clearly the defendant's claim could be compensated by monetary payment. The contrary was not true for the plaintiff. If an Erinford injunction was not granted, the loss and damage to the plaintiff would be beyond monetary compensation. Damages was not an adequate relief to the plaintiff (see pp 183I–184B).

(7) The court certainly had jurisdiction and powers to grant an injunction to restrain a winding up petition notwithstanding the fact that the petition had already been filed (see p 184E). *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533 followed.

[Bahasa Malaysia summary

Plaintif telah memohon dalam lampiran 22 untuk satu injunksi Erinford untuk menghalang defendan daripada mengambil langkah-

langkah selanjutnya dalam Petisyen Penggulungan No D3–28–1134–2002 sementara menunggu perbicaraan rayuan plaintif ke Mahkamah Rayuan terhadap keputusan yang dibuat oleh Mahkamah Tinggi yang menolak permohonan plaintif dalam lampiran 3 untuk satu injunksi bagi menghalang defendan daripada memfailkan satu petisyen penggulungan terhadap plaintif.

Diputuskan, membenarkan permohonan plaintif:

(1) Walaupun mahkamah terdahulu telah menolak permohonan plaintif di bawah lampiran 3, ia masih mempunyai bidang kuasa untuk mendengar permohonan ini untuk satu injunksi Erinford dan untuk membenarkan yang sama. Penimbangan membenarkan injunksi Erinford tersebut adalah berbeza dengan penimbangan di bawah permohonan di lampiran 3 dan tiada apa-apa yang tidak konsisten bagi mahkamah membenarkan permohonan di bawah lampiran 22 meskipun terdapat keputusan yang telah menolak lampiran 3 (lihat ms 182C–D); *Erinford Properties Ltd v Cheshire County Council* [1974] 2 All ER 448 diikut.

(2) Tuntutan tersebut tidak lebih daripada satu tuntutan wang yang sedang dipertikaikan oleh plaintif. Tidak terdapat keterangan yang mana plaintif tidak mampu dari segi kewangan untuk membayar jika benar ia kemudiannya didapati bahawa jumlah tersebut perlu dibayar (lihat ms 183A–B).

(3) Plaintif adalah sebuah syarikat awam yang disenaraikan dengan Bursa Saham Kuala Lumpur ('BSKL'). Ia menjalani satu latihan percantuman dengan TM Cellular Sdn Bhd dan setelah selesai yang sama, plaintif akan mempunyai jumlah pelanggan telefon bimbit terbesar dalam negara. Pemfailan petisyen tersebut akan mempunyai kesan buruk ke atas saham-sahamnya dan persepsi umum ke atas syarikat tersebut. Plaintif sebagai sebuah syarikat awam yang disenaraikan adalah juga tertakluk kepada pengawasan dan penyeliaan oleh BSKL dan Suruhanjaya Sekuriti. Plaintif mempunyai tanggungjawab untuk memaklumkan BSKL tentang petisyen di setiap peringkat dan plaintif berkemungkinan akan berhadapan dengan perjatian akhbar dan spekulasi yang timbul dairpada petisyen tersebut. Akibat sedemikian tidak boleh dikira dengan wang dan tidak boleh dipampas. Kepentingan umum adalah satu faktor yang relevan dan penting untuk dipertimbangkan (lihat ms 183B–D).

(4) Pemfailan petisyen membentuk satu kejadian pengingkaran perjanjian kemudahan antara plaintif dan pembiaya-pembiayanya. Terutamanya, plaintif baru selesai satu latihan penyusunan semula yang melibatkan jumlah RM1.8b dan dalam proses telah menjimatkan sejumlah wang yang besar untuk syarikat tersebut. Namun begitu, dengan pemfailan petisyen tersebut, plaintif sekarang telah mengingkari perjanjian tersebut dan sekarang bergantung nasib pada pembiaya-pembiayanya

berhubung sama ada kemudahan kewangan tersebut akan ditarik balik. Jika ini berlaku, keseluruhan organisasi plaintif akan terjejas dengan teruk. Ini adalah kemungkinan besar dan akan menjejaskan kesemua pemegang-pemegang sahamnya dan keseluruhan pasaran BSKL juga. Plaintif mempunyai satu tanggungjawab di sisi undang-undang dan secara moral kepada pelanggan-pelanggannya dan masyarakat awam untuk memastikan perkhidmatannya tidak terjejas (lihat ms 183F–G).

(5) Petisyen tersebut juga mempunyai kesan ke atas percantuman yang dicadangkan antara plaintif dan TM Cellular Sdn Bhd untuk sebab-sebab yang nyata kerana tiada entiti akan bersedia untuk cantum dengan satu yang lain jika ianya adalah perkara pokok satu petisyen penggulungan. Petisyen tersebut berdasarkan satu jumlah yang dipertikaikan yang tidak sepatutnya dibenarkan untuk diteruskan dan menghalang rancangan-rancangan percantuman tersebut (lihat ms 183G–H).

(6) Status quo hendaklah dikekalkan sementara menunggu penentuan rayuan plaintif. Ini untuk memastikan bahawa integriti rayuan tersebut dikekalkan dan yang sama tidak disebabkan tidak berguna. Dalam keadaan ini, status quo tersebut adalah kedudukan plaintif dan defendan sejurus sebelum pemfailan saman pemula dan lampiran 3 oleh plaintif. Kedudukan pada masa tersebut adalah tidak terdapat petisyen penggulungan yang telah difailkan terhadap plaintif. Imbangan kemudahan berpihak membenarkan injunksi Erinford tersebut. Adalah jelas tuntutan defendan boleh dipampas melalui bayaran wang. Yang sebaliknya tidak benar untuk plaintif. Jika satu injunksi Erinford tidak dibenarkan, kerugian dan kerosakan kepada plaintif akan melampaui pampasan wang. Ganti rugi bukan merupakan relif yang mencukupi untuk plaintif (lihat ms 183I–184B).

(7) Mahkamah sememangnya mempunyai bidang kuasa dan kuasa-kuasa untuk membenarkan satu injunksi untuk menghalang satu petisyen penggulungan meskipun pada hakikatnya petisyen tersebut telahpun difailkan; *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533 diikut (lihat ms 184E).]

Notes

For cases on injunctions, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 2463–3008.

Cases referred to

Azman & Tay Associates Sdn Bhd v Sentul Raya Sdn Bhd [2002] 4 MLJ 390 (refd)

Bina Satu Sdn Bhd v Tan Construction [1988] 1 MLJ 533 (folld)

Erinford Properties Ltd v Cheshire County Council [1974] 2 All ER 448 (folld)

Ng Kong You & Anor v MBf Property Services Sdn Bhd [2001] 5 MLJ 122 (refd)

Vijayalaskhmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors [1995] 2 MLJ 709 (refd)

Ong Chee Kwan (*Lee Ong & Kandiah*) for the plaintiff.

Paul Ong (*SS Tieh, Olivia Ho, SY Lim*) (*Paul Ong & Associates*) for the defendant.

Zulkefli J: This is the plaintiff's application (encl 22) for an Erinford injunction to restrain the defendant from taking further steps in Winding Up Petition No D3–28–1134–2002 ('the petition') pending the hearing of the plaintiff's appeal to the Court of Appeal against the decision made by this court on 15 November 2002 in dismissing the plaintiff's application for an injunction to restrain the defendant from filing a winding up petition against the plaintiff (encl 3).

Although I had earlier dismissed the plaintiff's application under encl 3, it is my view that I would still have the jurisdiction to hear this application for an Erinford injunction and to grant the same. The consideration for the granting of the Erinford injunction is different from the consideration under the application in encl 3 and there is nothing inconsistent for me to grant the prayers under encl 22 notwithstanding the decision dismissing encl 3. For this proposition I would like to refer to the case of *Erinford Properties Ltd v Cheshire County Council* [1974] 2 All ER 448 wherein his lordship Megarry J had stated as most succinctly the basis for such jurisdiction to grant an injunction pending appeal at p 454 as follows:

> I can see no real inconsistency in any of these cases. The questions that have to be decided on the two occasions are quite different. Putting it shortly, on a motion the question is whether the applicant has made out a sufficient case to have the respondent restrained pending the trial. On the trial, the question is whether the plaintiff has sufficiently proved his case. On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes *functus officio quoad* granting any injunction at all.

Based on the aforesaid principles applicable for an Erinford injunction, it is my view that the plaintiff's application herein should be allowed for the following reasons:

(1) the defendant's purported claim is for a sum of RM17,702,019.79 allegedly being the balance outstanding amount for services rendered pursuant to a service provider agreement dated 30 May 1997. The claim is nothing more than a monetary claim which is being disputed by the plaintiff. There is no evidence that the plaintiff is not financially able to pay if indeed it is subsequently found that the said amount is due;

(2) the plaintiff is a public listed company with the Kuala Lumpur Stock Exchange ('KLSE'). It is currently undergoing a merger exercise with TM Cellular Sdn Bhd and upon completion of the same, the plaintiff will have the largest number of subscribers for mobile phones in the country. The filing of the petition will have an adverse impact on its shares and the public perception of the company. The plaintiff as a public listed company is also subject to constant monitoring and supervision by the KLSE and the Securities Commission. The plaintiff is under a duty to apprise the KLSE of the petition at every stage and the plaintiff will have to face likely media attention and speculation arising from the petition. Such consequences cannot be quantified in monetary terms and cannot be compensated. The public interest is a relevant and important factor for consideration as correctly held by his lordship Mohamed Dzaiddin FCJ (as he then was) in the Federal Court case of *Vijayalaskhmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709 wherein he stated, inter alia, '... in exercising its discretion, the court will consider not only the interest of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large ...';

(3) the filing of the petition constitutes an event of default in the facilities agreement between the plaintiff and its financiers. In particular, the plaintiff has recently completed a restructuring exercise involving a sum of RM1.8b and in the process saving the company a substantial amount of money. However, with the filing of the petition, the plaintiff is now in default of the agreement and is now at the mercy of its financiers as to whether the facilities would be recalled. In the event this occurs, the entire organization of the plaintiff will be adversely affected. This is a real possibility and would affect all its shareholders and all the KLSE market as well. The plaintiff owes a responsibility both legally and morally to its subscribers and the public to ensure that its services are not affected;

(4) the petition will also have an impact on the proposed merger between the plaintiff and TM Cellular Sdn Bhd for obvious reason as no entity would be prepared to merge with another if the latter is a subject matter of a winding up petition. The plaintiff had already obtained all relevant approvals for the merger and has made the announcement to the market. The petition based on a disputed sum should not be allowed to proceed and thwart the merger plans.

It is my view that the status quo should be preserved pending the determination of the plaintiff's appeal. This is to ensure that the integrity of

the appeal is preserved and the same is not rendered nugatory. In this regard, the status quo is the position of the plaintiff and the defendant immediately before the filing of the originating summons and encl 3 by the plaintiff. The status at that time is that there is no winding up petition filed against the plaintiff. The balance of convenience is in favour of granting the Erinford injunction. Clearly, the defendant's claim can be compensated by monetary payment. The contrary is not true for the plaintiff. If an Erinford injunction is not granted, the loss and damage to the plaintiff will be beyond monetary compensation. Damages is not an adequate relief to the plaintiff.

As regards the two cases of *Azman & Tay Associates Sdn Bhd v Sentul Raya Sdn Bhd* [2002] 4 MLJ 390 and *Ng Kong You & Anor v MBf Property Services Sdn Bhd* [2001] 5 MLJ 122 cited by learned counsel for the defendant to support his contention that an Erinford injunction cannot be granted by this court once the winding up petition has been filed, I could not agree with such a contention. In *Azman & Tay Associates Sdn Bhd*, the learned judge was dealing with an application for an injunction to restrain from advertising or otherwise publishing the existence or contents of a winding up petition. Similarly in the case of *Ng Kong You & Anor*, the learned judge there was also dealing with an application for an injunctive order to restrain the petitioners from advertising the petition. Both these two cases are not cases of an Erinford injunction restraining a winding up petition from proceeding pending the hearing of the appeal of an application to restrain the filing of the winding up petition. The facts of the said two cases are clearly distinguishable from the present case.

It is my view that the court certainly has jurisdiction and powers to grant an injunction to restrain a winding up petition notwithstanding the fact that the petition has already been filed. This is clear from the case of *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533 where his Lordship VC George J (as he then was), inter alia, had this to say at p 534:

> Section 23(2) of the Courts of Judicature Act 1964 provides confirmation that the court continues to enjoy its inherent powers. This includes the power to restrain any abuse of its proceedings. A classic illustration of the abuse of court proceedings is provided in *Re A Company* [1894] 2 Ch 349 where it was held that where a petition against a company is presented ostensibly for a winding up order but in reality for another purpose such as to bring pressure to bear on the company, the court has an inherent jurisdiction to prevent such an abuse of process and will do so by injunction. In *Cadiz Waterworks Co v Barnett* LR 19 Eq 182 it was for the same reason held that the creditor of a solvent company whose debt is bona fide disputed will be restricted from presenting a petition for winding up the company.

For the above stated reasons and in the exercise of my discretionary powers, I hereby allowed the plaintiff's application. The cost of this proceedings shall be costs in the cause.

Plaintiff's application allowed.

Reported by Chew Phye Aun